



## STRENGTHENING THE GLOBAL TRADE AND INVESTMENT SYSTEM FOR SUSTAINABLE DEVELOPMENT



### **G20 International Investment Agreements and Guiding Principles for Global Investment Policymaking**

Rodrigo Polanco Lazo

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E15 Investment Theme

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7 Chemin de Balexert, 1219 Geneva, Switzerland  
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World Economic Forum  
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Rodrigo Polanco Lazo is an Assistant Professor of International Economic Law at the Universidad de Chile and Researcher at the World Trade Institute at the University of Bern.

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# ABSTRACT

The objective of this research is to map the international investment agreements (IIAs) concluded by Group of Twenty (G20) countries, examining whether there is a common thread between those countries with respect to investment protection and especially the G20 Guiding Principles for Global Investment Policymaking. For that purpose, the most important provisions on investment protection were examined in all available IIAs across all G20 countries. These include the scope and definition of investment and investors; the existence of establishment or pre-establishment commitments; standards of treatment and their limitations; and the main standards of protection, like expropriation, transfers, and umbrella clauses. Finally, we examined the presence of investor-state dispute settlement (ISDS) provisions and their limitations. At the same time, we mapped the presence of the Guiding Principles for Global Investment Policymaking in existing IIAs concluded by G20 countries.

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# ABBREVIATIONS AND ACRONYMS

ADR	alternative dispute resolution
BIT	bilateral investment treaty
CECA	Comprehensive Economic Cooperation Agreement
CETA	Comprehensive Economic and Trade Agreement
CFIA	Cooperation and Facilitation Investment Agreement
CSR	corporate social responsibility
ECT	Energy Charter Treaty
EDIT	Electronic Database of Investment Treaties
EU	European Union
FDI	foreign direct investment
FET	fair and equitable treatment
FPS	full protection and security
FTA	free trade agreement
G20	Group of Twenty
IIA	international investment agreement
ISDS	investor-state dispute settlement
MFN	most-favoured nation
NAFTA	North American Free Trade Agreement
NT	national treatment
OIC	Organisation of Islamic Cooperation
PR	performance requirement
PTA	preferential trade agreement
SADC	Southern African Development Community
SNIS	Swiss Network for International Studies
TIPS	treaties with investment provisions
TPP	Trans-Pacific Partnership
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UAE	United Arab Emirates
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
US	United States
WTI	World Trade Institute

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# INTRODUCTION

The Group of Twenty (G20), is a forum for international economic cooperation and decision-making among the governments of the 20 major economies. It consists of 19 individual countries – Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Republic of Korea, Russian Federation, Saudi Arabia, South Africa, Turkey, the United Kingdom (UK), and the United States (US) – together with the European Union (EU).<sup>1</sup>

The G20 started as a meeting of Finance Ministers and Central Bank Governors that took place in Berlin on 15-16 December 1999, in the aftermath of the Asian financial crisis. Almost a decade later, on 14-15 November 2008, the first G20 Leaders' Summit was held in Washington DC, during the US subprime mortgage crisis.<sup>2</sup> Currently, G20 heads of government or heads of state meet annually with a view to studying, reviewing, and promoting high-level discussion of policy issues pertaining to the promotion of international financial stability. In addition, Finance Ministers and Central Bank Governors meet regularly during the year to discuss ways to strengthen the global economy, reform international financial institutions, improve financial regulation, and discuss the key economic reforms that are needed in each of the member countries.<sup>3</sup>

Together, the G20 economies account for two-thirds of the world population, about 85 percent of the gross world product, and 80 percent of world trade (or 75 percent, excluding EU intra-trade).<sup>4</sup> In 2015, the G20 countries generated more than three-quarters of global GDP and attracted half of global world foreign direct investment (FDI) flows (although nearly two-thirds of the total inflows were concentrated only in the US, China, and Brazil) and some 58 percent of global FDI stock is invested in the G20 (US\$14.4 trillion). Intra-investment is a significant source of FDI within the G20, accounting for an annual inflow average of 42 percent in the last five years. The G20 economies are home to more than 95 percent of the Fortune Global 500 companies.<sup>5</sup>

G20 countries represent an important part of the universe of international investment agreements (IIAs), accounting for 1574 treaties (about 44 percent of a total of 3583 IIAs),<sup>6</sup> including 1290 bilateral investment treaties (BITs) and 284 treaties with investment provisions (TIPs), which include preferential trade agreements (PTAs) with investment chapters, usually free trade agreements (FTAs).<sup>7</sup>

Following their meeting in Shanghai on 9-10 July 2016, G20 trade ministers issued a statement reinforcing their determination to promote inclusive, robust, and sustainable trade and investment growth, and agreed on nine "G20 Guiding Principles for Global Investment Policymaking," established as a result of discussions within the G20 Trade and Investment Working Group, to foster an open, transparent

global policy environment that is conducive for investment and promoting coherence in national and international investment policymaking and inclusive economic growth and sustainable development. These principles are:

- I. Governments should avoid protectionism in relation to cross-border investment.
- II. Investment policies should establish open, non-discriminatory, transparent, and predictable conditions for investment.
- III. Investment policies should provide legal certainty and strong protection to investors and investments, tangible and intangible, including access to effective mechanisms for the prevention and settlement of disputes, as well as to enforcement procedures. Dispute settlement procedures should be fair, open, and transparent, with appropriate safeguards to prevent abuse.
- IV. Regulation relating to investment should be developed in a transparent manner with the opportunity for all stakeholders to participate, and embedded in an institutional framework based on the rule of law.
- V. Investment policies and other policies that impact on investment should be coherent at both the national and international levels and aimed at fostering investment, consistent with the objectives of sustainable development and inclusive growth.
- VI. Governments reaffirm the right to regulate investment for legitimate public policy purposes.
- VII. Policies for investment promotion should be effective and efficient, aimed at attracting and retaining investment, and matched by facilitation efforts that promote transparency and are conducive for investors to establish, conduct and expand their businesses.

1 | B20 Coalition, "What Is G-20| G-20 Members| G-20 Presidency| G-20 Functioning" (August 2016) <<http://www.b20coalition.org/about-G-20.php>> accessed 12 September 2016.

2 | Kirton, John J. 2016. G20 Governance for a Globalized World. New York: Routledge

3 | G-20, "About G-20 - G-20 - China 2016" (August 2016) <[http://www.G-20.org/English/aboutG-20/About\\_G-20/201511/t20151127\\_1609.html](http://www.G-20.org/English/aboutG-20/About_G-20/201511/t20151127_1609.html)> accessed 12 September 2016.

4 | *ibid.*

5 | United Nations Conference on Trade and Development. 2016. "Investor Nationality: Policy Challenges." In *World Investment Report 2016*, by UNCTAD, 124-193. New York: UNCTAD.

6 | The universe of known IIAs at the time of this report is a total of 3583, including 3155 BITs and 428 TIPs. SNIS Project 'Diffusion of International Law: A Textual Analysis of International Investment Agreements'.

7 | United Nations Conference on Trade and Development. Investment Policy Hub. Accessed September 12, 2016. <http://investmentpolicyhub.unctad.org/IIA/IIAsByCountry#iialInnerMenu>

- VIII. Investment policies should promote and facilitate the observance by investors of international best practices and applicable instruments of responsible business conduct and corporate governance.
- IX. International community should continue to cooperate and engage in dialogue with a view to maintaining an open and conducive policy environment for investment, and to address shared investment policy challenges.

# PURPOSE OF THE STUDY – METHODOLOGY

The purpose of this study is to map the IIAs currently concluded by G20 economies, with the goal of examining whether there is a common thread between those countries regarding investment protection. For that purpose, core provisions on investment protection were examined in all available IIAs of G20 countries. These provisions include the scope and definition of both investment and investors; the presence of establishment or pre-establishment commitments; standards of treatment — national treatment (NT); most-favoured nation (MFN); full protection and security (FPS); and fair and equitable treatment (FET). They also include the main standards of protection, like protection

against expropriation (including standards of compensation, and protection against indirect expropriation), free transfers of funds (and the presence of exceptions like balance of payments difficulties), and umbrella clauses. Finally, we examined ISDS provisions and whether they were limited by MFN clauses.

- Canadian IIAs mapped by UNCTAD, do not include 12 BITs and 7 PTAs with investment chapters. Manual mapping of NAFTA, the Comprehensive Economic and Trade Agreement (CETA), and the Trans-Pacific Partnership (TPP) was added to the data.
- The EU has not concluded BITs as a Union, although its members have concluded a large number of these treaties. The EU has recently concluded negotiations of PTAs with investment chapters with Canada (CETA), Singapore, and Viet Nam, which were manually mapped for this study.
- French IIAs mapped by UNCTAD, does not include 25 BITs. The Energy Charter Treaty (ECT) was manually mapped and added to the data.
- German IIAs mapped by UNCTAD, does not 47 include BITs. The ECT was manually mapped and added to the data.
- Italy IIAs mapped by UNCTAD, do not include 38 BITs. On 31 December 2014, Italy notified its withdrawal from the ECT. Under Article 47(2) of the ECT, any such withdrawal shall take effect upon the expiry of one year after the date of the receipt of the notification by the Depositary. Therefore, the withdrawal from the ECT by Italy took effect on 1 January 2016.
- Mexican IIAs mapped by UNCTAD, do not include eight BITs and seven PTAs with investment chapters. Manual mapping of NAFTA and the TPP was added to the data.
- UK IIAs mapped by UNCTAD, do not include eight BITs. The ECT was manually mapped and added to the data.
- US IIAs mapped by UNCTAD, do not include 23 BITs and 13 PTAs with investment chapters. Manual mapping of NAFTA and the TPP was added to the data.

TABLE 1:  
Descriptive statistics of the data set

Country	Number of IIAs	BITs	TIPs	Main Source
Argentina	60	58	2	Electronic Database of Investment Treaties
Australia	42	23	19	Electronic Database of Investment Treaties
Brazil	23	20	3	Electronic Database of Investment Treaties
Canada <sup>8</sup>	36	31	5	UNCTAD Mapping
China	160	142	18	Electronic Database of Investment Treaties
EU <sup>9</sup>	3	0	3	Electronic Database of Investment Treaties
France <sup>10</sup>	91	90	1	UNCTAD Mapping
Germany <sup>11</sup>	109	108	1	UNCTAD Mapping
India	88	83	5	Electronic Database of Investment Treaties
Indonesia	76	70	6	Electronic Database of Investment Treaties
Italy <sup>12</sup>	66	66	0	UNCTAD Mapping

Country	Number of IIAs	BITs	TIPs	Main Source
Japan	42	27	15	Electronic Database of Investment Treaties
Mexico <sup>13</sup>	30	26	4	UNCTAD Mapping
Russia	81	79	2	Electronic Database of Investment Treaties
Saudi Arabia	33	22	11	Electronic Database of Investment Treaties
South Africa	48	47	1	Electronic Database of Investment Treaties
South Korea	102	95	7	Electronic Database of Investment Treaties
Turkey	98	95	3	Electronic Database of Investment Treaties
United Kingdom <sup>14</sup>	92	92	0	UNCTAD Mapping
United States <sup>15</sup>	49	47	2	UNCTAD Mapping
Total	1326	1221	108	



At the same time, we mapped the presence of the Guiding Principles for Global Investment Policymaking in existing IIAs concluded by G20 countries. For that purpose, we equated each principle with the presence of certain provisions in IIAs that share the same objectives, as follows:

- Principle I: Performance requirements
- Principle II: NT, MFN, and transparency
- Principle III: Prevention of disputes, “enhanced” ISDS
- Principle IV: Transparency
- Principle V: Sustainable development
- Principle VI: Right to regulate
- Principle VII: Investment promotion
- Principle VIII: Corporate social responsibility
- Principle IX: Technical cooperation/capacity building

The data set used in this research was composed of BITs and PTAs with investment chapters or similar agreements concluded by G20 countries that are publicly available, taken from the United Nations Conference on Trade and Development (UNCTAD) database,<sup>16</sup> together with the World Trade Institute (WTI) Electronic Database of Investment Treaties (EDIT), funded by the Swiss Network for International Studies (SNIS) with texts not available at UNCTAD.<sup>17</sup> The mapping was done on the official texts of agreements concluded before September 2016, regardless of whether they were in force.<sup>18</sup> When the text was not available in English, the study of IIAs was done by researchers or research assistants knowledgeable of both investment law and the language of the agreement. The mapping was double-coding performed to try to get concordance among the mappers.

IIAs from Argentina, Australia, Brazil, China, India, Indonesia, Japan, Republic of Korea, Russian Federation, Saudi Arabia, South Africa, and Turkey were mapped manually, using texts publicly available from those countries. Information from North American Free Trade Agreement (NAFTA) member states (Canada, Mexico, and the US), as well as from the EU (France, Germany, Italy, and the UK), was taken from the UNCTAD's IIA Mapping Project,<sup>19</sup> which includes a substantive (but only partial) mapping of those countries. This approach was taken, owing to the large number of IIAs from both NAFTA and EU member countries. The total numbers of IIAs mapped for this study are listed below.

## COMMON THREADS ON G20 INVESTMENT AGREEMENTS

There is a great discrepancy between G20 countries in terms of the numbers of IIAs they have concluded so far. While some countries, mostly EU member states (France, Germany, and the UK) as well as China and South Korea have signed about 100 BITs; other G20 countries (like Australia, Brazil, Japan, and Saudi Arabia) have concluded substantively fewer agreements.

Some G20 countries also have important differences with respect of the ratification of IIAs. The prime example is Brazil, which has concluded 20 BITs — including in this group the Cooperation and Facilitation Investment Agreements (CFIAs) negotiated in the last two years but has none of those treaties in force. Only South Africa has a higher rate of treaties that are not in force (25 of 40), followed by Indonesia (39 of 71). In contrast, Australian IIAs are all in force, with the sole exception of the TPP.

## SCOPE OF APPLICATION

Almost all G20 countries usually have included definitions of investment as an open list of assets in their IIAs. We found the same trend even in treaties recently concluded, such as the CETA and the TPP. The practice of defining investment as a closed list of assets or enterprises is rare and is mostly found among NAFTA signatories, notably Canada (38 percent of all mapped Canadian IIAs) and Mexico (14 percent of all mapped Mexican IIAs).

However, definitions that rely on open lists of assets usually include certain qualifications. First, the majority of G20 countries require the investment be made in accordance with the host state's laws and regulations (60 percent of the sample). Only the US, the UK, Japan, and

<sup>16</sup> | *ibid.*

<sup>17</sup> | Swiss Network for International Studies. 2015. “Diffusion of International Law: A Textual Analysis of International Investment Agreements”. Swiss Network for International Studies. Accessed September 12, 2016. [http://www.snis.ch/project\\_diffusion-international-law-textual-analysis-international-investment-agreements](http://www.snis.ch/project_diffusion-international-law-textual-analysis-international-investment-agreements)

<sup>18</sup> | As the purpose of the study is to identify the common trends in the negotiation of IIAs across G20 countries; terminated and renegotiated IIAs were also included in the sample.

<sup>19</sup> | United Nations Conference on Trade and Development. Investment Policy Hub. Accessed September 12, 2016. <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iialnnerMenu>

Germany usually do not include such a requirement in their agreements.

Second, some G20 countries have followed the trend of the CETA and the TPP to limit the scope of investment by defining certain characteristics of the investment. This feature is particularly applied by Japan (in 26 percent of its IIAs); followed by Mexico (in 21 percent of its mapped IIAs); and Australia (in 19 percent of its IIAs).

With respect to the definition of investor, another important element that delineates the scope of application of an IIA, it is a common practice of G20 countries (also in the CETA and NAFTA) to define investors as nationals (97 percent), including in that definition natural persons and

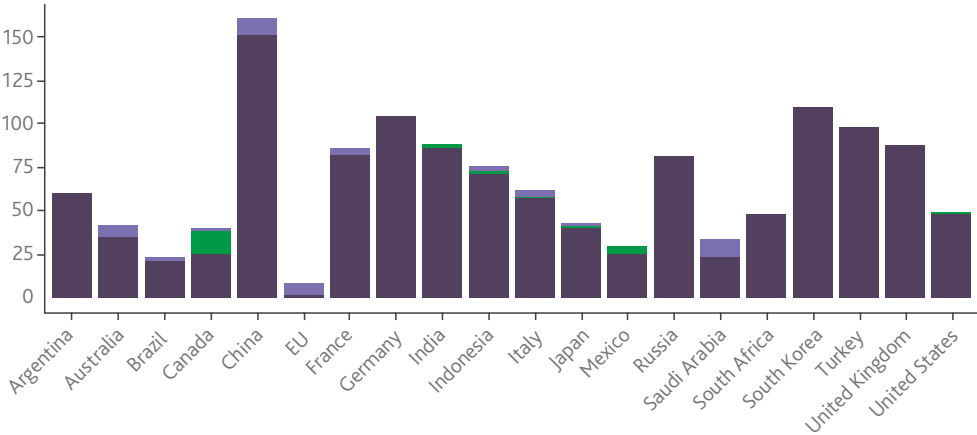
legal entities. With respect to double nationality, Australia (96 percent of its IIAs) and Canada (43 percent of its mapped IIAs) are the primary G20 countries that follow the CETA limitation to exclude dual nationals or dual citizens from the protections of the IIAs.

Another frequent limitation to the definition of investor is the inclusion of provisions that clarify the thresholds of ownership and control of legal entities to be considered a foreign investor (61 percent of G20 countries). In the same line, 61 percent of IIAs concluded by G20 countries include the additional requirement of having substantial business activities (as for example is found in the CETA), or the place of principal seat (as is found in several German BITs).

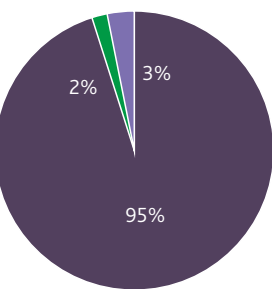
FIGURE 1:

Definitions of investment

a) by country



b) G20 (all treaties)



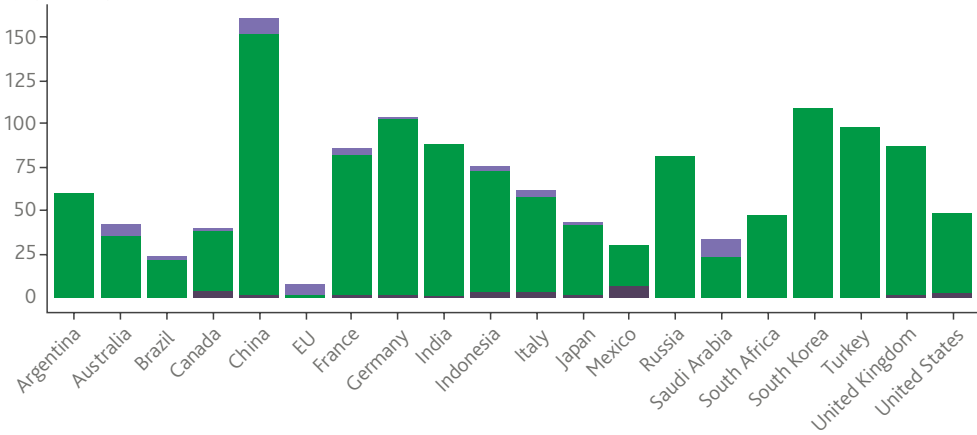
LEGEND:

- Asset-based definition
- Enterprise-based definition
- No definition

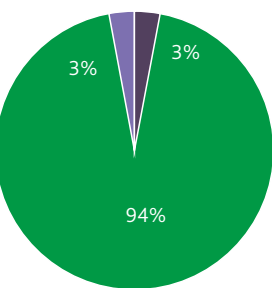
FIGURE 2:

Treaties that set out closed exhaustive list of covered assets

a) by country



b) G20 (all treaties)



LEGEND:

- Yes
- No
- Not applicable



FIGURE 3:

Treaties that define certain characteristics of investment

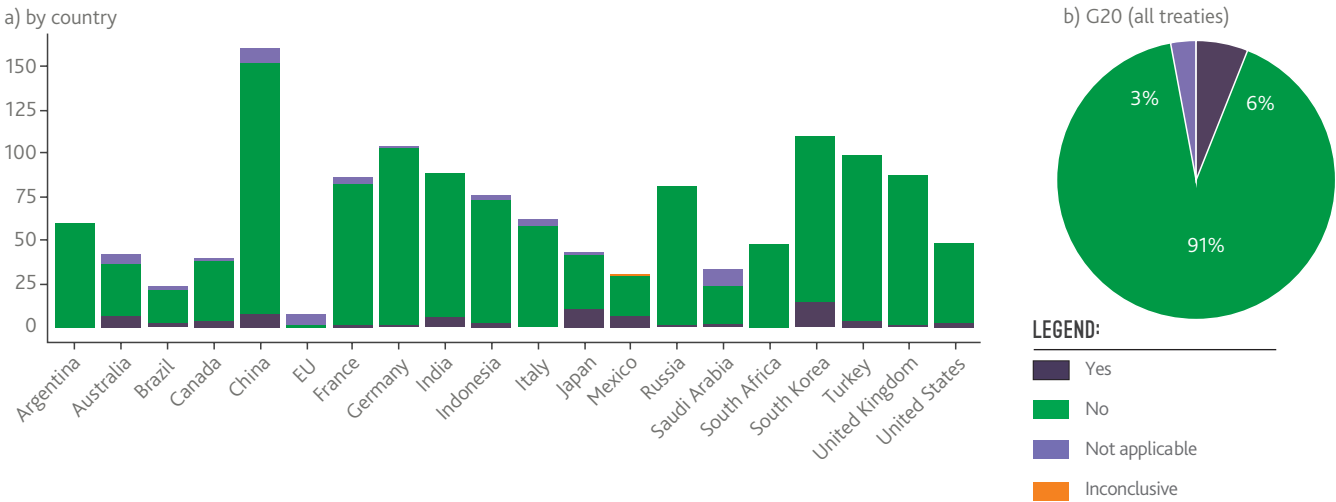


FIGURE 4:

Definition of investor

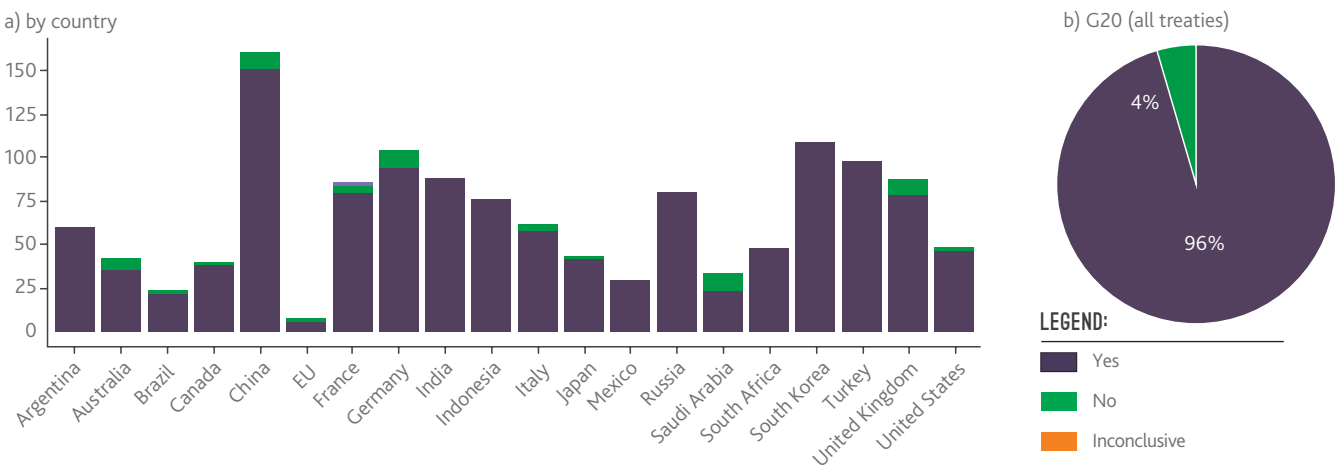


FIGURE 5:

Treaties that exclude dual nationals from definition of investor

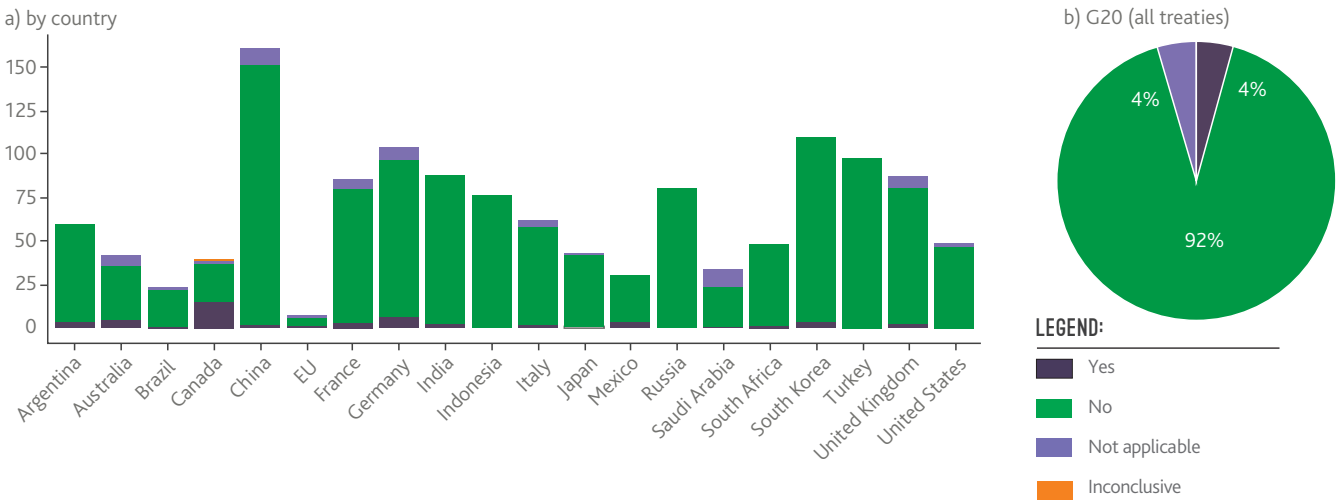


FIGURE 6:

Treaties that define ownership and control of legal entities

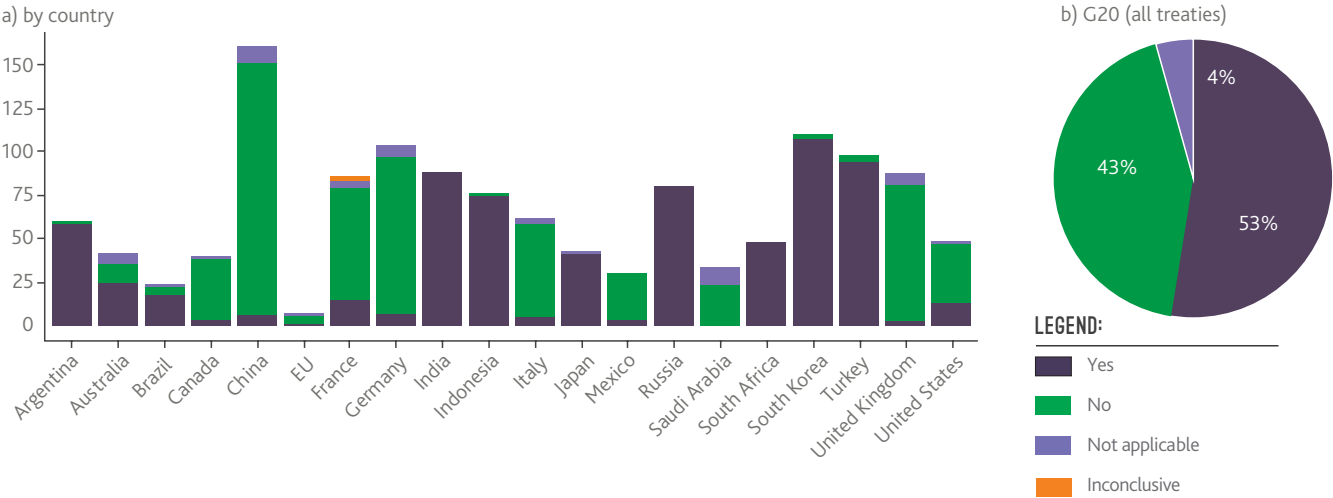
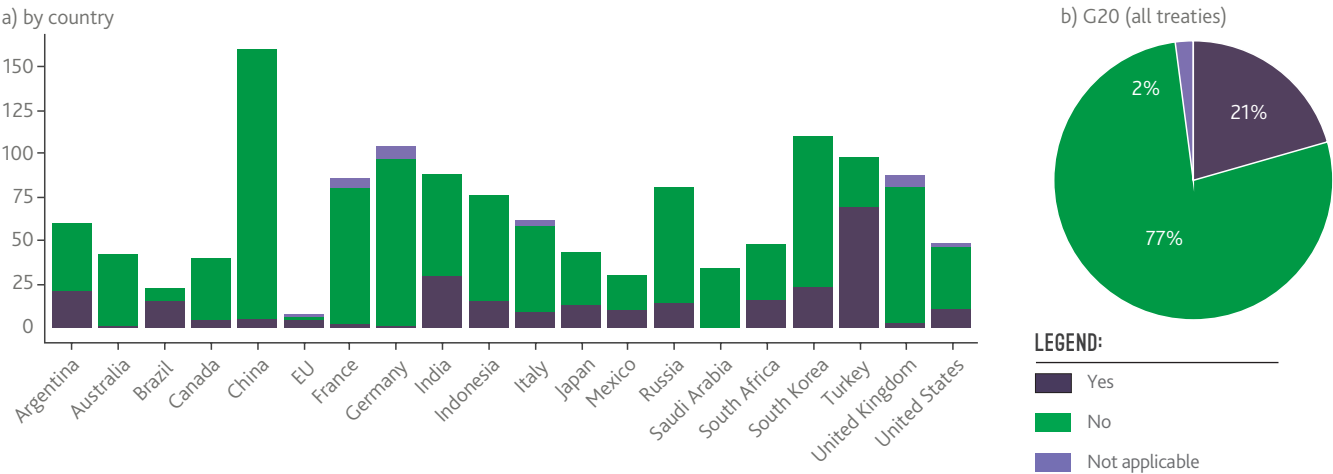


FIGURE 7:

Treaties that include requirement of substantial business activity



# G20 GUIDING PRINCIPLES FOR GLOBAL INVESTMENT

## Principle I: Avoid protectionism in relation to cross-border investment

Approximately 65 percent of the G20 countries include a non-binding provision with respect to establishment, while only four of the G20 countries (Australia, Canada, Japan, and the US) extend the protections of the treaty to the pre-establishment phase, a feature that is also found in the ECT, NAFTA, the CETA, and the TPP. The extension of NT and MFN provisions in both pre- and post-establishment phases is examined in the following sections together with those standards of treatment.

Only 16 percent of the G20 countries provide for an explicit prohibition of performance requirements (PRs) in their IIAs (100 percent of US IIAs, 92 percent of Canadian IIAs, 76 percent of Japanese IIAs, 28 percent of Italian IIAs, 21 percent of French IIAs, 21 percent of Mexican IIAs, 19 percent of Australian IIAs and 15 percent of South Korean IIAs). Since this prohibition is also found in NAFTA, the CETA, and the TPP, it can be assumed that countries that often require pre-establishment commitments also require a prohibition on PRs.

## Principle II: Open, non-discriminatory, transparent, and predictable conditions for investment.

Most of the G20 countries apply a broad and unqualified NA provision in their IIAs (59 percent). Not only European countries follow this trend, but also Argentina, Brazil, India,

FIGURE 8:

Treaties that include a prohibition on performance requirements

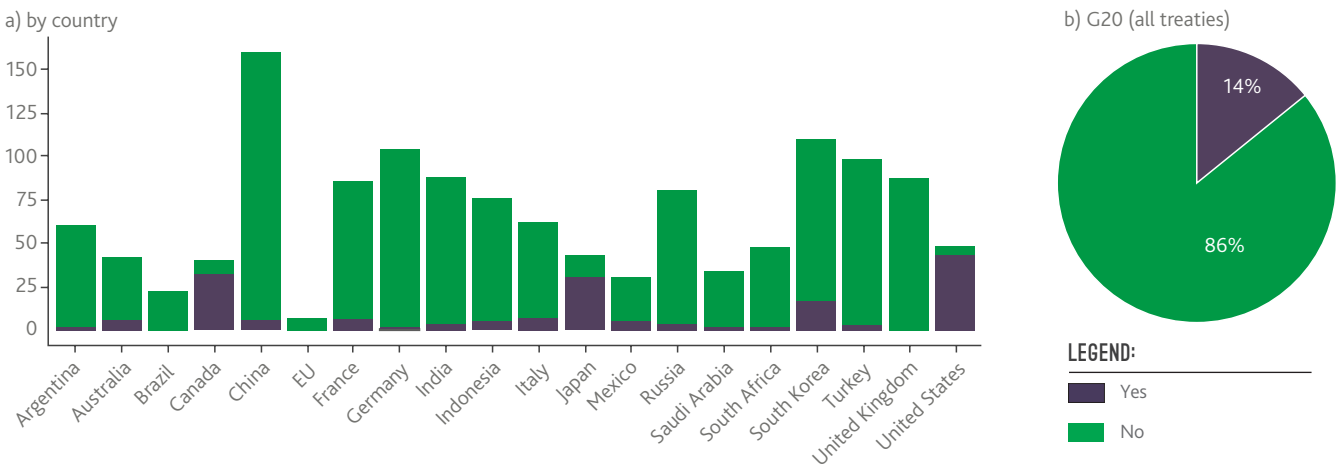
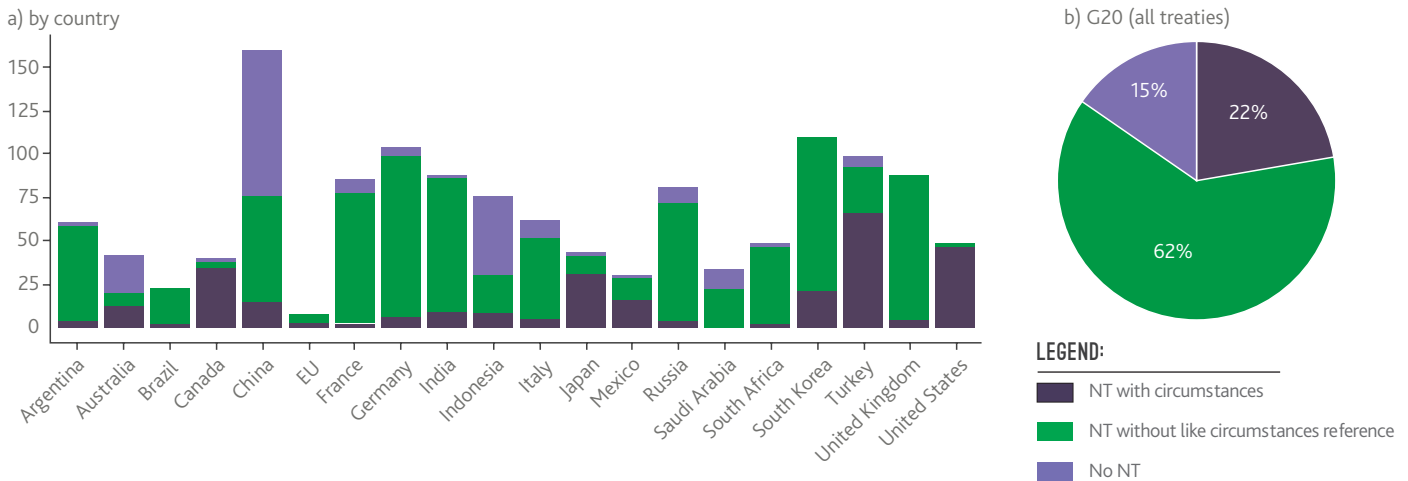


FIGURE 9:

Types of national treatment clauses



South Korea, and the Russia Federation. It is the practice of only six of the G20 countries to limit the NT provision to "in like circumstances" (as considered in NAFTA) or "in like situations" (as considered in the CETA). The US has negotiated in all its IIAs an NT clause that is limited to "in like circumstances" and is followed closely by Japan, Mexico, and Turkey as well as to a lesser extent Canada.

In contrast, about 16 percent of the IIAs concluded by G20 countries do not include NT provisions. Indonesia (58 percent) and China (55 percent) have the highest number of treaties that do not provide NT to foreign investors in their IIAs.

Unlike NAFTA, the CETA, and the TPP, most IIAs concluded by G20 countries do not extend the scope of NT to the pre-establishment phase. Only the US and Canada have most

of their treaties negotiated with an NT clause that covers both pre- and post-establishment. Some countries limit the scope of NT in the post-establishment phase to only certain matters and/or sectors (Japan, Russian Federation, and Saudi Arabia). Recent EU PTAs, like the CETA and the EU-Viet Nam FTA, also cover the pre-establishment phase, but ISDS is not allowed on claims based on market access restrictions.

Half of the G20 countries apply a broad unqualified MFN clause (Argentina, Australia, Brazil, Canada, India, Indonesia, Russian Federation, South Korea, Turkey, and the US). This is different from what is found in NAFTA, the CETA, and the TPP, which limit the scope of the application of MFN treatment to "in like circumstances" or "in like situations" and only to certain matters and/or sectors. Moreover, unlike NAFTA, the CETA, and the TPP, it is not a common practice

FIGURE 10:

Types of most-favoured nation clauses

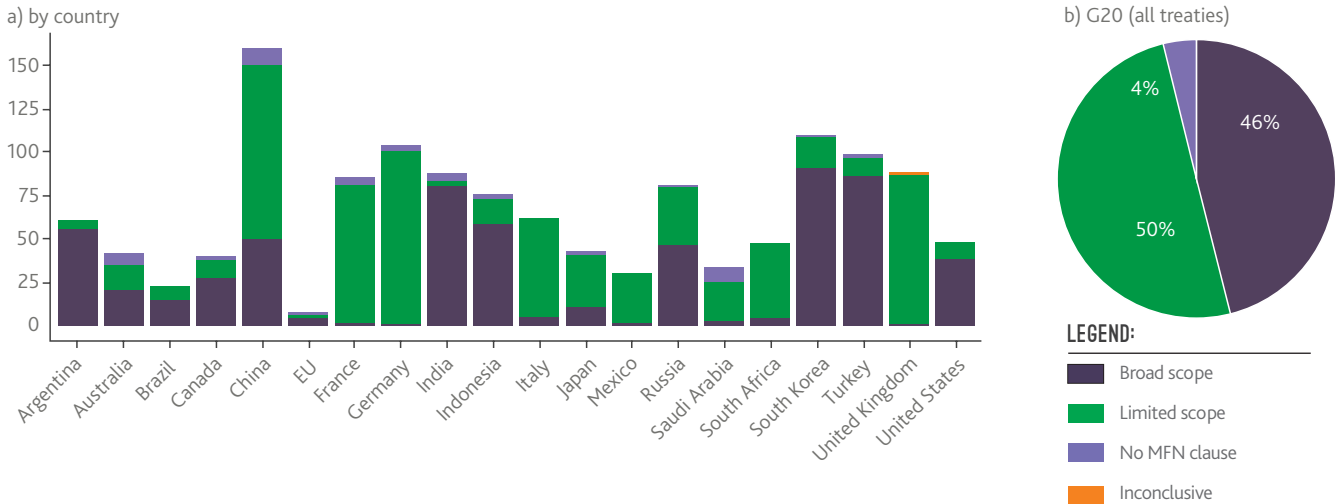
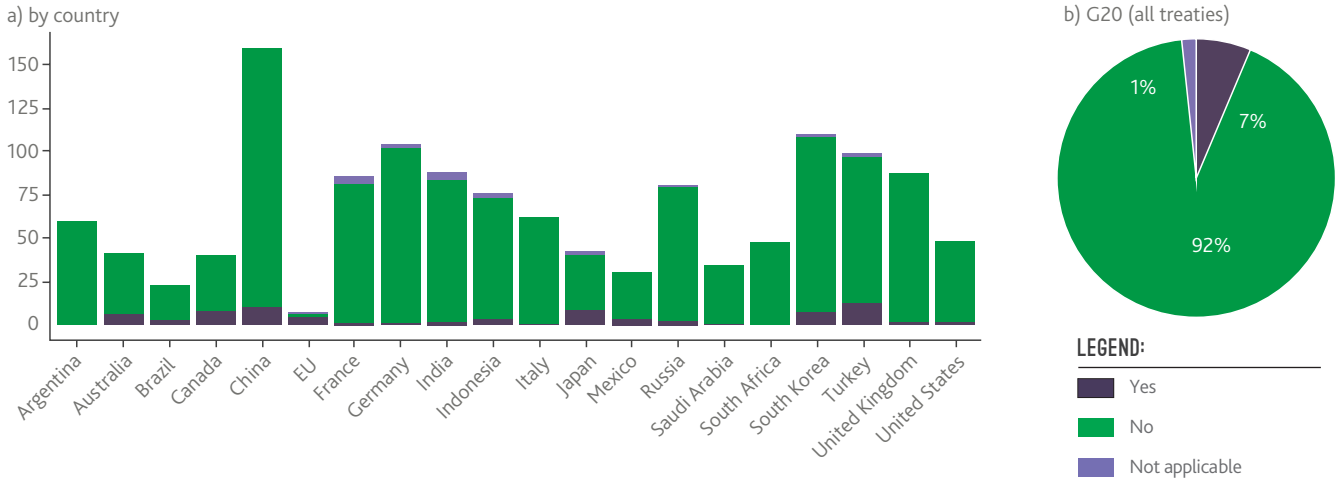


FIGURE 11:

Most-favoured nation exclusion of investor-state dispute settlement



of G20 countries to extend the MFN treatment provision to the pre-establishment phase. The countries with the largest number of treaties that include such clauses are those concluded by the US, Canada, and to a lesser extent, Australia and PTAs recently negotiated by the EU, like the CETA and the EU-Viet Nam FTA.

Although the CETA and the EU-Viet Nam FTA, as well as the TPP, exclude ISDS from the operation of the MFN provision, this practice is not widely applied by the G20 countries. Japan and Canada exclude procedural issues from MFN treatment in approximately 20 percent of their IIAs, followed by Brazil, Turkey, and Mexico in approximately 10 percent of their IIAs.

Most G20 countries include an unqualified FET standard in their IIAs (80 percent). Only 10 percent of G20 countries

link FET to international minimum standards of treatment (Canada, France, Mexico, and the US) as in the TPP. The two countries with the highest number of IIAs that do not consider FET to foreign investors in their investment treaties are Brazil and Turkey.

In addition to NAFTA and the TPP, about 82 percent of G20 countries' IIAs provide FPS to foreign investors. Brazil, India, Italy, and Turkey have the highest number of treaties without any FPS guarantee. Furthermore, the FPS standard is sometimes referred to as "protection", "legal protection", or "physical protection", such as in the CETA, 60 percent of South African IIAs, 60 percent of Indonesian IIAs, and 39 percent of Chinese IIAs. A further limitation is provided by the Russian IIAs (61 percent of its IIAs), which require the FPS standard to be in accordance with national laws.

FIGURE 12:

Fair and equitable treatment clauses

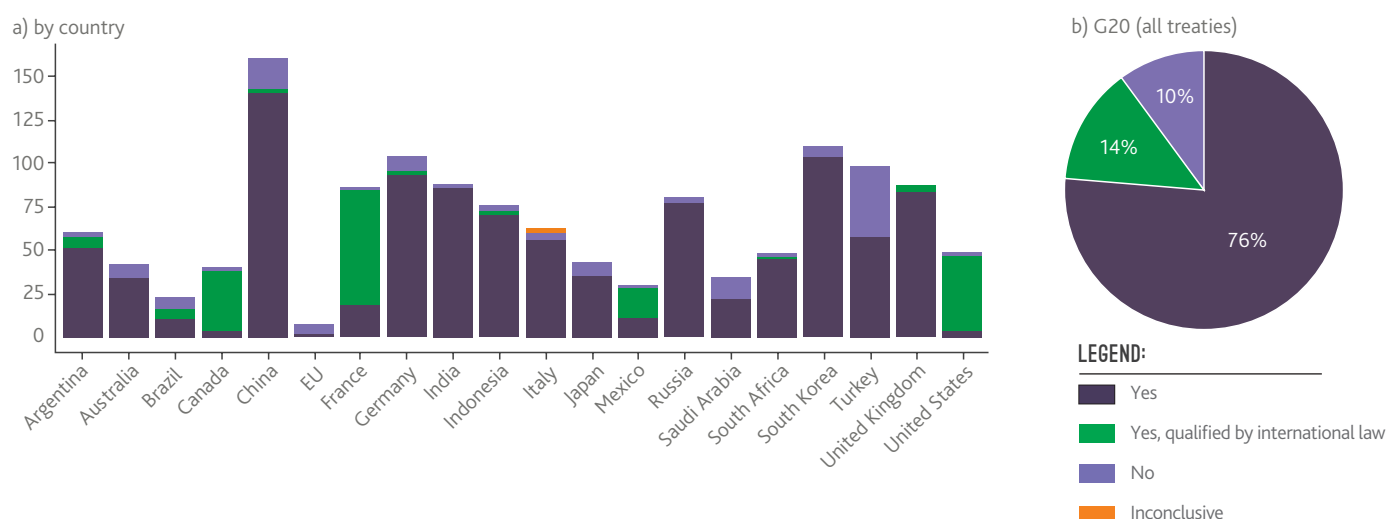
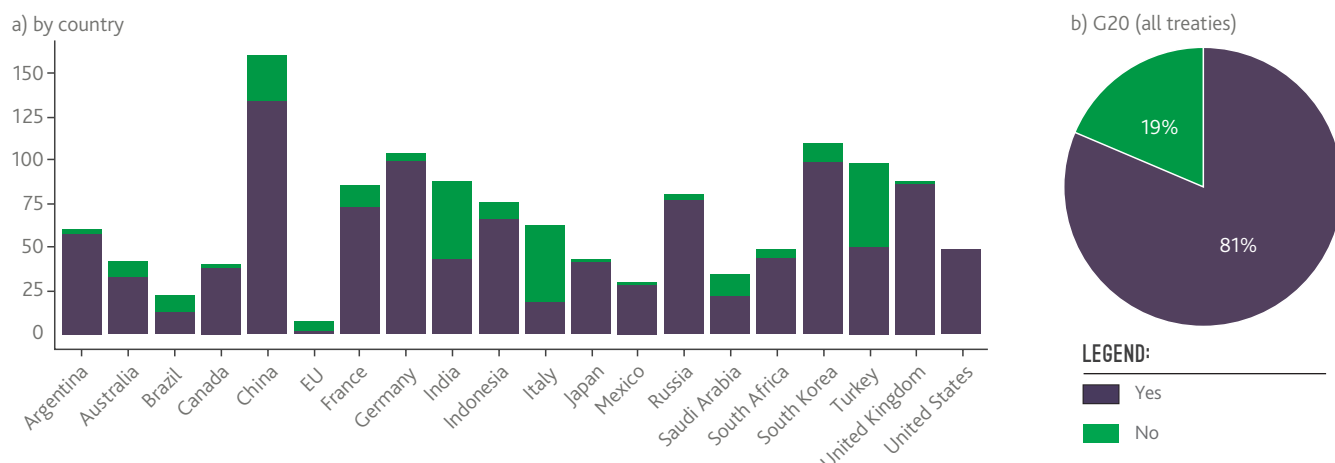


FIGURE 13:

Full protection and security provisions



Principle III: Prevention and settlement of disputes

The common practice of all G20 countries is to include ISDS provisions in their IIAs, usually under the form of investor-state arbitration. The CETA and the EU-Viet Nam FTA include a novel standing investment tribunal and an appellate tribunal. However, there are few IIAs that do not include an ISDS provision at all. From all the investment treaties that were mapped, only 40 agreements (4 percent) do not provide an ISDS clause. The large majority of this group is made up of association, cooperation, and framework agreements. Some agreements are already terminated (nine of the sample) and several are not yet in force (like the CFIA's concluded by Brazil in 2015 and 2016). 65 percent of Brazilian IIAs include an ISDS provision – all Brazilian BITs and the MERCOSUR internal protocol. The MERCOSUR external protocol considers consultations only in case of disputes between investors and

host states. It is important to highlight that ISDS is not included in any of the seven IIAs signed by Brazil since 2015, where only consultations and direct negotiations are considered as dispute settlement mechanisms, with an ombudsman established in each contracting party as a point of contact.

In few cases, the ISDS is limited to certain disputes. NAFTA (with respect to Canada and Mexico); the CETA; the TPP (with respect to Canada and Mexico) and 12 percent of Chinese IIAs exclude admission disputes from ISDS. The TPP also excludes permanent residents from a contracting party from ISDS, and Australia and New Zealand have negotiated an overall exclusion of ISDS under a side letter of the TPP. Another limitation to ISDS can be found in 8 percent of Australian IIAs that require the investor to exhaust local remedies before turning to international arbitration. All G20 IIAs include inter-state dispute settlement mechanisms.

FIGURE 14:

Treaties that include investor-state dispute settlement

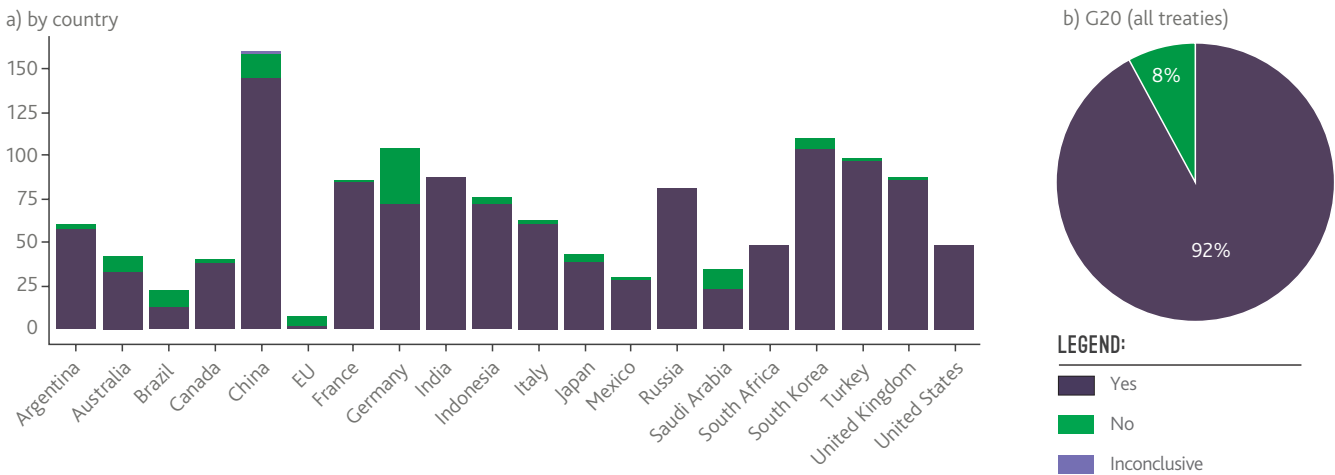
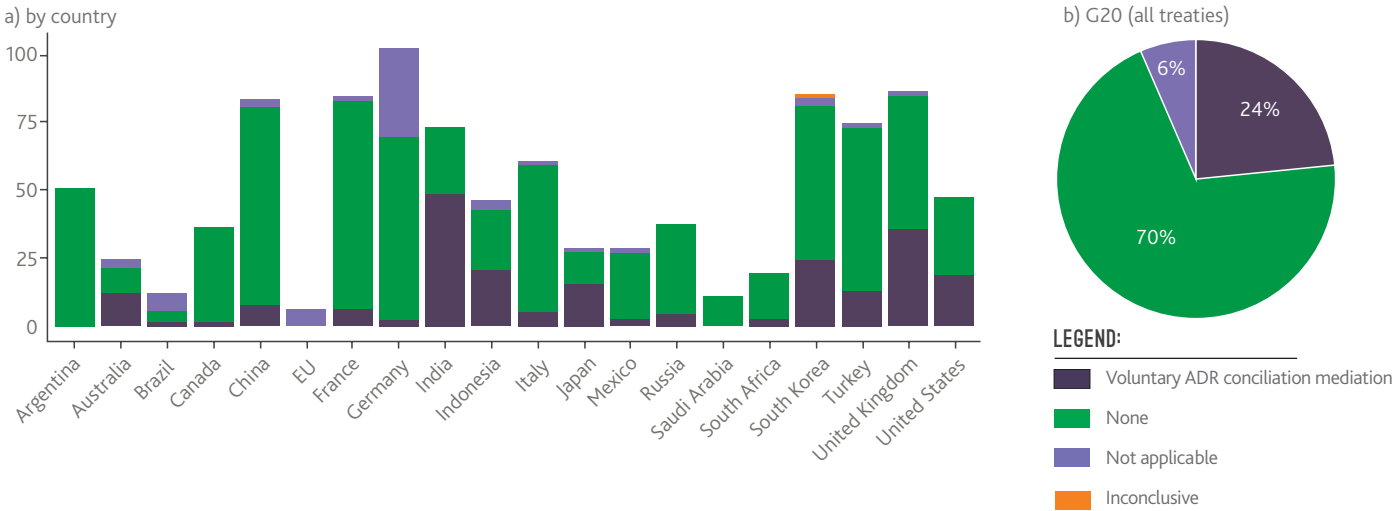


FIGURE 15:

Alternatives to arbitration





There are almost no IIAs concluded by G20 countries that include compulsory alternative dispute resolution (ADR) — conciliation/mediation. From the mapped agreements, only the 2009 ASEAN-Australia-New Zealand FTA makes such dispute resolution compulsory. Voluntary ADR mechanisms are found in very few IIAs of these countries, notably: the US (in 15 agreements representing 31 percent of its IIAs); Australia (in 13 agreements, representing 31 percent of its IIAs); Japan (in 13 agreements, representing 31 percent of its IIAs); Brazil (in 7 agreements, representing 30 percent of its IIAs); India (in 8 agreements, representing 9 percent of its IIAs); and the Russian Federation. Only six Russian IIAs (7 percent) include a voluntary alternative to dispute resolution (the 2013 not yet in force Guatemala-Russia BIT, the 1994 India-Russia BIT, the 1998 Japan-Russia BIT, the 1989 Netherlands-Russia BIT, the 1992 not yet in force Russia-USA BIT, and the 2015 not yet in force Eurasian Economic Union-Viet Nam FTA). South Korea

includes this type of provision in five agreements, representing 5 percent of its IIAs).

At the other extreme, Canada, and Turkey include these provisions in only two agreements, and Indonesia, India, Mexico, and the UK in only one.

#### Principle IV: Transparency

G20 IIAs include transparency provisions, both directed to states (obligations to publish laws and regulations), and to investors (e.g., a treaty authorises the host states to collect from investors information about their corporate governance, or any other information, including for informational or statistical purposes). However, both types of obligations are not equally prevalent in the G20 universe of investment agreements.

FIGURE 16:

Provisions directed at states to publish laws and regulations

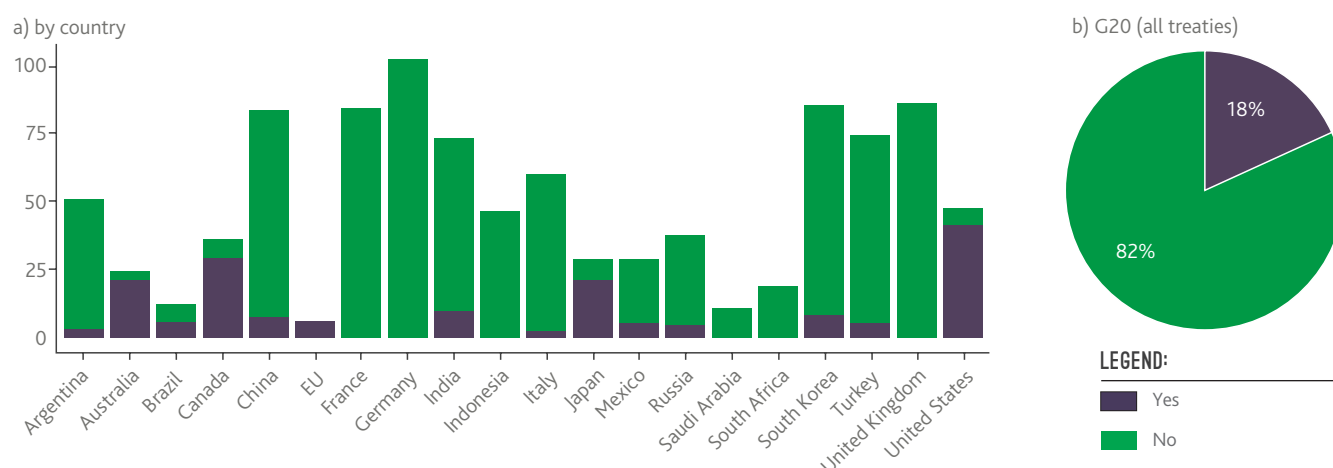
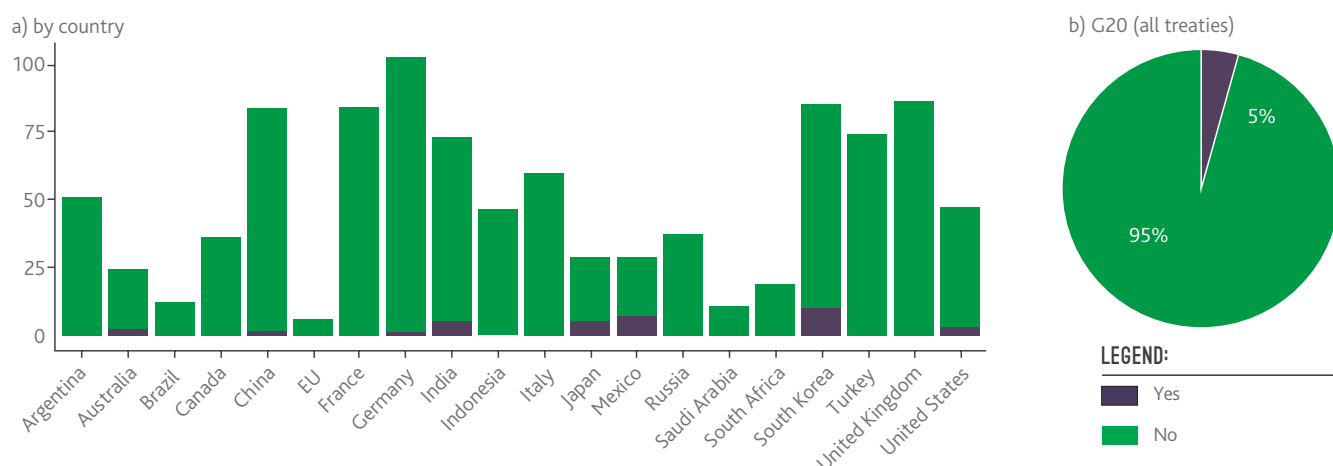


FIGURE 17:

Transparency provisions directed at investors



Transparency provisions directed to states are found in about 18 percent of the treaties, notably in those concluded by the US (86 percent); Canada (83 percent); Japan (52 percent); Australia (50 percent); Brazil (30 percent); Mexico (20 percent); and in the recent eight agreements concluded by the EU. These provisions are notoriously less present in the IIAs concluded by India (11 percent); South Korea (9 percent); Argentina (7 percent); Russian Federation (6 percent); Turkey (6 percent); Italy (5 percent); and China (5 percent). Finally, only one treaty concluded by France, Germany, Saudi Arabia, and the UK included obligations to the state to publish laws and regulations, and none are found in South African IIAs.

In contrast, transparency obligations directed at investors are less present than those directed at states in the universe of G20 IIAs. Only Mexico (27 percent) and the Russian Federation (16 percent) have an important number of agreements including those provisions. Yet, the obligation of the contracting states to publish all laws and regulations is not common in Russian investment treaty practice. Only 13 of 82 Russian IIAs have such a transparency requirement.

Other countries that include these provisions are Japan (14 percent); South Korea (11 percent); the US (8 percent); Australia (7 percent); and India (7 percent). Only four South African IIAs are in compliance with Principle IV to publish laws and regulations (the 1998 Russia-South Africa BIT, the 1998 South Africa-Sweden BIT, the 2006 SADC Investment Protocol, and the 1995 not yet in force Canada-South Africa BIT). Among Saudi Arabia's agreements, only the Saudi – Japan BIT (2013) requires states to publish their laws.

All other G20 countries have statistically irrelevant agreements with these provisions, or almost none, as is the case for Brazil, Italy, and the UK.

## Principle V: Sustainable development

The consideration of sustainable development provisions or sustainable development principles is scarce in the investment treaty practice of G20 countries.

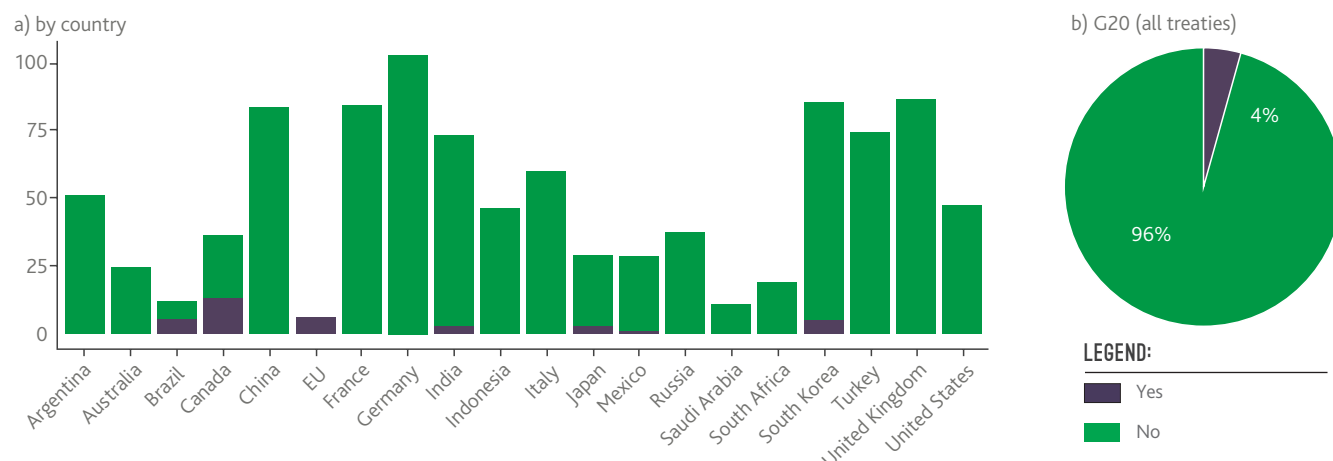
Reference to sustainable development is rarely found in the preamble of these agreements. Although it is found in 30 percent of the Brazilian IIAs, all of them correspond to the new type of agreements that have been signed since 2015, and in the eight agreements recently concluded by the EU, none of them is in force yet. Canada is the main country including this reference in the preamble of 39 percent of its investment treaties, followed from afar by Japan (10 percent); South Korea (6 percent); Mexico (6 percent); and India (3 percent). In this country, references to sustainable development are found in only three agreements (the 2009 India-South Korea CEPA, the 2011 India-Japan EPA, and the 2005 India-Singapore Comprehensive Economic Cooperation Agreement (CECA). Among all Chinese IIAs, sustainable development appears only in the Republic of Korea-China FTA (2015). Similarly, in the case of Indonesia and Saudi Arabia, the only agreement that provides for a sustainable development clause is the 1981 Indonesia-Organisation of Islamic Cooperation (OIC) Investment Agreement.

No reference to sustainable development is found in IIAs concluded by Argentina, Australia, France, Germany, Italy, Russian Federation, South Africa, Turkey, the UK, or the US.

Provisions of not lowering environmental or labour standards are less unusual in the G20 IIAs universe and are included in 50 percent of Canadian IIAs and 48 percent of Japanese IIAs. Other countries that include these clauses in their investment treaties but on a lower scale are Brazil (13 percent); Mexico (13 percent); South Korea (8 percent); Italy (8 percent); France (7

FIGURE 18:

References to sustainable development



percent); the US (6 percent); the UK (5 percent); Germany (4 percent); India (4 percent); and Turkey (4 percent).

Article 9.16 of the TPP (that would bind Australia, Canada, Japan, and the US), also includes a statement that nothing in the investment chapter shall be construed to prevent a party from adopting, maintaining, or enforcing any measure otherwise consistent with it, that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, or other regulatory objectives.

#### Principle VI: Right to regulate

Reference to the "right to regulate" or similarly to regulatory autonomy, policy space, or flexibility to introduce new regulations, are scarcely found in IIAs concluded by G20 countries, in either the preamble or the main provisions of the treaty.

At the preamble level, these references are found only in the agreements concluded by Brazil (13 percent); Canada (8 percent); South Korea (2 percent); and in single treaties concluded by France and Mexico.

References to right to regulate are more often found in the binding parts of G20 investment agreements, notably in the treaties concluded by Brazil (13 percent); Japan (7 percent); the US (4 percent); South Korea (2 percent); and in the eight agreements recently concluded by the EU. There are also only 3 Indian agreements that reaffirm the state's right to regulate (the 2007 India-Trinidad and Tobago BIT, the 2011 India-Malaysia FTA, and the 2005 India-Singapore CECA).

From all Australian and Chinese IIAs, only the Australia-China FTA (2015) explicitly included the state's right to regulate.

Only in the 2015 not yet in force BIT between the Eurasian Economic Union (the Russian Federation is a member) and Viet Nam, the host state's right to regulate for a legitimate public purpose is recognised. Similarly, the only South African agreement that provides for a right to regulate clause is the 2006 Southern African Development Community (SADC) Investment Protocol. A similar reference is found in one BIT concluded by Turkey and France, respectively. No Saudi treaty included this feature.

#### Principle VII: Investment promotion/facilitation

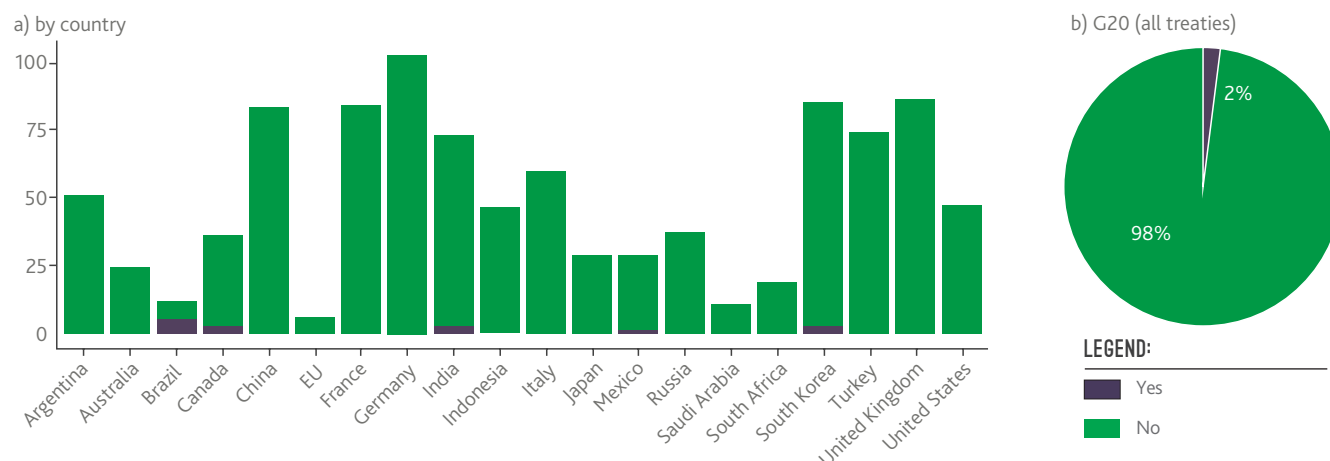
References to specific investment promotion activities – outside the preamble, or the title of the agreement, are found in several G20 IIAs, notably in those concluded by Brazil (30 percent); Japan (26 percent); Mexico (20 percent); Canada (19 percent); Italy (17 percent); the UK (17 percent); China (16 percent); India (16 percent); South Korea (13 percent); Australia (12 percent); and Germany (11 percent). Other countries with fewer investment agreements with explicit provisions on investment promotion include Argentina (8 percent); France (8 percent); Turkey (6 percent); Russian Federation (5 percent); and the US (4 percent).

Only one South African investment treaty includes provisions on investment promotion (the 1998 BIT with Spain), and none is found in the agreements concluded by Saudi Arabia.

The practice of including an investment facilitation clause is also not very common in G20 IIAs. For example, only 2 of 89 Indian investment treaties include such a clause (the 2013 India-United Arab Emirates (UAE) BIT and the 2014 not yet in force ASEAN-India Investment Agreement). Investment facilitation is included in only five Indonesian IIAs (6 percent): the 2014 not yet in force ASEAN-India Investment Agreement, the 2009 ASEAN-China Investment Agreement,

FIGURE 19:

References to the right to regulate



the 2009 Indonesia-ASEAN Comprehensive Investment Agreement, the 1981 Indonesia-OIC Investment Agreement, and the terminated 1968 Indonesia-Netherlands BIT. Investment facilitation is also available in only one Japanese treaty: the 2005 Japan-Malaysia EPA.

Principle VIII: Corporate social responsibility

The mention of corporate social responsibility (CSR) is rarely found in G20 IIAs, considering the preamble and main body of the text.

At a preambular level, only three Indian treaties (with Austria, the Czech Republic, and Trinidad and Tobago) mention CSR. When it comes to the text of the agreement, only the treaties concluded by Canada (28 percent), followed by a long distance by Mexico (6 percent); Japan (5 percent); South Korea (2 percent) and the most recent seven agreements concluded by the EU, include references to principles of CSR. The only South African agreement that provides for a CSR clause is the 2006 SADC Investment Protocol.

Only the French BIT with Colombia (2014) and the US BIT with Belarus (1994) include this type of provision. The Australian, Saudi Arabian, and Chinese IIAs do not refer to the principles of CSR.

Article 9.17 of the TPP (that would bind Australia, Canada, Japan, and the US), includes a statement that the parties reaffirm the importance of each party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines, and principles of CSR that have been endorsed or are supported by that party.

Principle IX: Technical cooperation/capacity building

References to activities of technical cooperation or capacity building are found only in some G20 IIAs, notably in those concluded by Brazil (26 percent) and Mexico (13 percent).

Other G20 countries have relatively few treaties including these provisions. These include Italy (9 percent); Australia (7 percent); France (7 percent); Germany (6 percent); the UK (6 percent); Japan (5 percent); Canada (5 percent); Turkey (4 percent); the US (4 percent); and the Russian Federation (2 percent).

OTHER STANDARDS OF PROTECTION

Almost all G20 countries guarantee free transfer of funds in their IIAs. Half of them frequently guarantee an unlimited free transfer of funds without considering any exception. The other half subject the guarantee of free transfer of funds to few exemptions, such as in the case of balance of payments difficulties or demanding compliance from an investor to protect the creditors. The countries that provide for exceptions to the free transfer of funds are generally the US, the EU, Canada, Japan, Mexico, South Africa, Indonesia, Australia, and France. The same approach has been applied in the ECT, NAFTA, the CETA, and the TPP. Another type of exception to free transfer of funds could be found in 69 percent of South African IIAs, which exclude permanent residents that possess the nationality of the contracting party from this protection.

An umbrella clause is found in an important number of IIAs concluded by G20 countries (58 percent). These include Germany (83 percent); South Africa (83 percent); the UK (79 percent); and South Korea (79 percent).

FIGURE 20:

Mention of corporate social responsibility

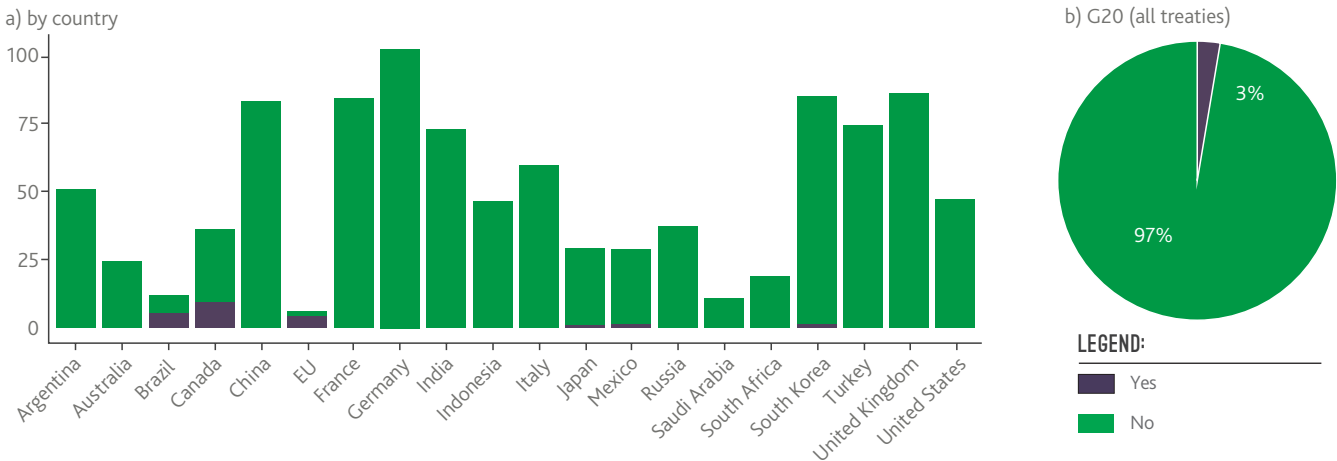


FIGURE 21:

Treaties that include free transfer of funds

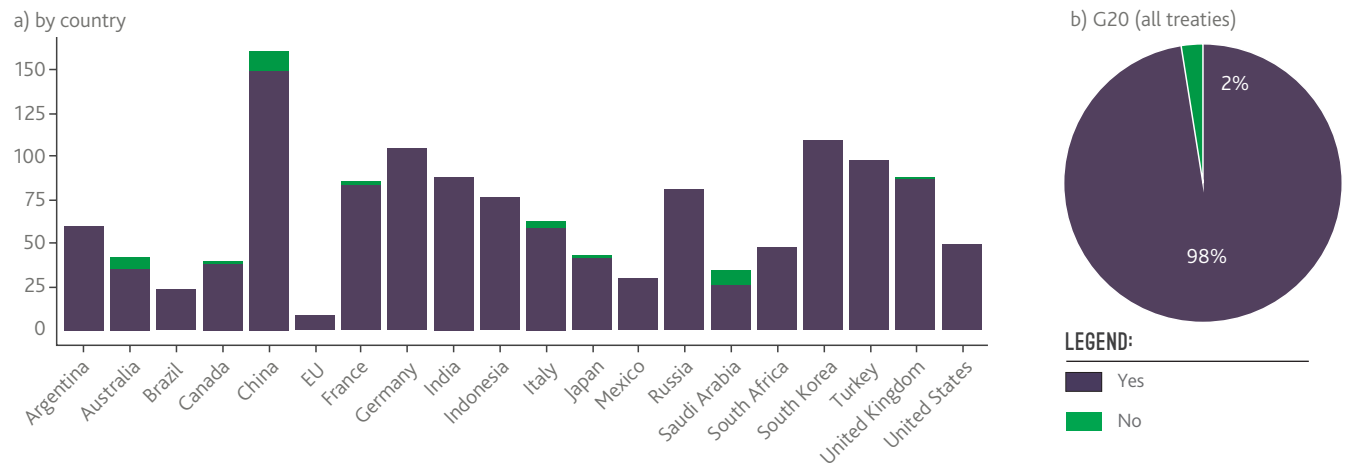


FIGURE 22:

Treaties that include an umbrella clause

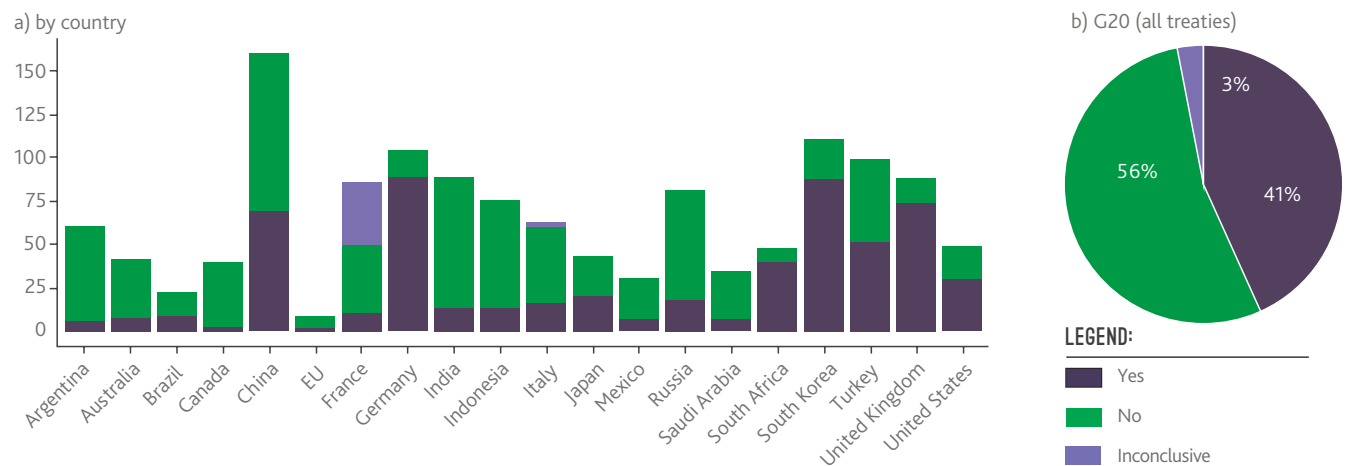
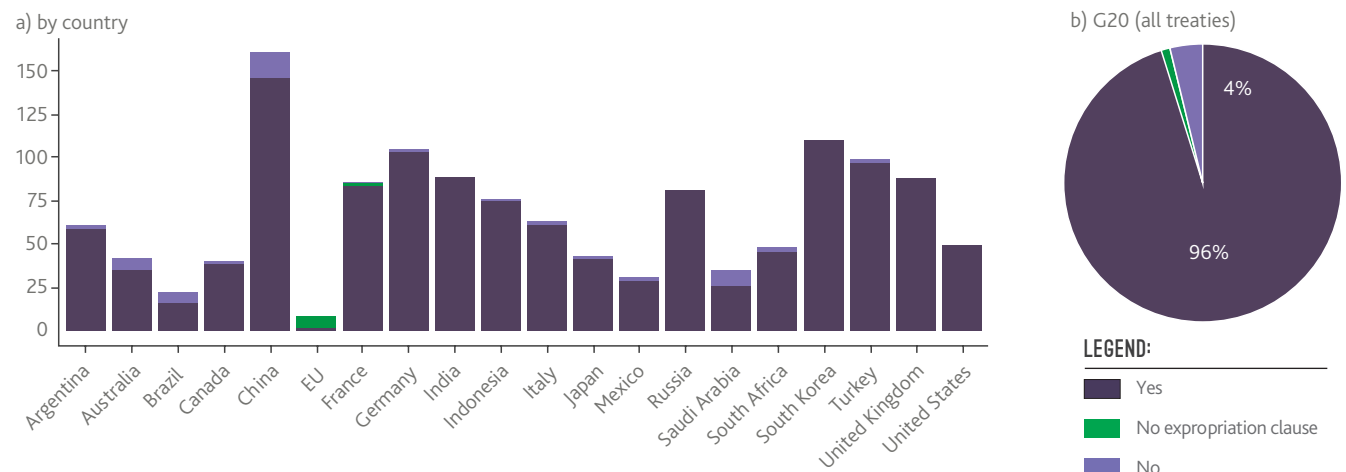


FIGURE 23:

Treaties that mention indirect expropriation of assets



It is widely accepted among the G20 countries to provide compensation for expropriation in accordance with the "Hull Formula" ("prompt, adequate, and effective"), a feature that is also found in multi-party agreements like the ECT, NAFTA, the CETA and the TPP. Some G20 countries (20 percent) have a greater number of treaties that provide an exception to compensation for expropriation to protect the public welfare (56 percent of mapped Canadian IIAs, 23 percent of Indian IIAs, 17 percent of Japanese IIAs, and 12 percent of Turkish IIAs).

All BITs concluded by G20 countries provide protection to foreign investors in case of indirect expropriation, and this is also the general rule in multi-party agreements like the ECT, NAFTA, the CETA, and the TPP. The only limited exception where this provision is not included is in some EU Association or Cooperation Agreements.<sup>20</sup> Another small number of treaties exclude measures taken for a public purpose from the compensatory indirect expropriation (49 percent of Canadian IIAs and 22 percent of German IIAs), while other treaties exempt compulsory licenses in accordance with WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) from the scope of expropriation (the CETA, the TPP, and 78 percent of Canadian IIAs).

## CONCLUSION

After analysing the investment treaties concluded by the G20 countries, we can characterise the common threads of their agreements. Following the findings described in the preceding sections, an average G20 country IIA would include the features described below:

### a) Scope of application

Investment is defined as every kind of asset, including a non-exhaustive list of covered assets and does not require certain characteristics of the investment.

Investors are defined as natural persons who are nationals or citizens of the contracting party and judicial entities with their place of incorporation in the contracting party.

### b) Promotion and Admission

The admission clause merely requires a non-binding establishment in accordance with contracting parties' domestic laws and regulations.

### c) Standards of Treatment

The NT standard covers only investments in the post-establishment phase and is broadly defined without reference to "in like circumstances."

The MFN treatment standard only stretches to investments in the post-establishment phase and is limited to investments and investors "in like circumstances" and certain sectors. Moreover, the ISDS is not excluded from the scope of the MFN treatment.

An unqualified FET standard is included without reference to customary international law.

The FPS standard is also included without any further qualifications.

### d) Standards of Protection

The free transfer of funds is guaranteed without any further exceptions for financial difficulties and/or protection of creditors.

A prompt, adequate, and effective compensation for expropriation is provided (Hull formula), including compensation for indirect expropriation without any exceptions, such as measures adopted for a public policy objective or compulsory licenses under TRIPS.

An umbrella clause is not included in the treaty. Similarly, there is no clause that prohibits performance requirements.

### e) ISDS

The treaty provides for ISDS without any exemptions for certain disputes or investors and ISDS mechanisms.

With respect to the application of the guiding principles for global policymaking, we can conclude that is very different throughout the G20 countries, with a clear difference between principles that correspond to a more traditional content of investment treaties (Principle I: performance requirements; Principle II: NT, MFN, and transparency; and Principle III: prevention of disputes, "enhanced" ISDS), which are largely followed, with respect to more novel principles (Principle IV: transparency; Principle V: sustainable development; Principle VI: right to regulate; Principle VII: investment promotion; Principle VIII: CSR; and Principle IX: technical cooperation/capacity building), that are largely pending complete implementation, with important differences across G20 countries.

It would be very interesting to see how G20 countries will implement these principles. Are they planning to renegotiate the investment agreements they already have, or just include them in future ones? If the latter is the case, these principles will have very limited scope, as several of the G20 countries have concluded a large number of

20 See, for example, EU-Iraq Cooperation Agreement, EU-Ukraine Association Agreement, EU-Georgia Association Agreement, EU-Moldova Association Agreement, and the EU-Kazakhstan Partnership and Cooperation Agreement.



investment treaties. This will be undoubtedly a "policy feast" of sorts.<sup>21</sup>

Adequate implementation will be key not only for effective harmonisation or policy convergence around these principles across G20 countries, but also for non-G20 countries, especially for developing and less advantaged economies that will need to see that the largest economies of the world preach by example and include these principles in future negotiations and renegotiations of investment agreements.

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Ana Novik, "G20 Serves an Appetiser to a Potential Investment Policy Feast" (*OECD Insights Blog*, 13 July 2016) <<https://oecdinsights.org/2016/07/13/g20-serves-an-appetiser-to-a-potential-investment-policy-feast/>> accessed 31 October 2016.

Implemented jointly by ICTSD and the World Economic Forum, the E15 Initiative was established to convene world-class experts and institutions to generate strategic analysis and recommendations for government, business, and civil society geared towards strengthening the global trade and investment system for sustainable development.